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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 685

UNION RAILWAY COMPANY,
Petitioner,

vs.

SWIFT & COMPANY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JACK PETREE
EVANS, PETREE, COBB & EDWARDS
900 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Respondent

E. L. MERIDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-2020

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No. 685

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

For the Court's convenience in resolving the issues presented in the Petition for Certiorari, respondent desires to supplement petitioner's Statement of the Case.

I. Construction of the Indemnity Agreement Treated As a Question of Law—Not Fact

Consistent with the rules governing construction of written contracts, the District Court treated the question of the construction of the indemnity agreement involved here solely as a question of law and not as a question of fact,

as petitioner here contends. Quite early in that part of the trial relating to the indemnity agreement, the District Court made this observation:

> "THE COURT: Gentlemen, *it is my understanding it is going to be just a question of law* whether Swift & Company were liable to the railroad in the event Swift & Company (sic, railroad) were liable to the plaintiff. At the present time I don't see any issue of fact to be submitted to the jury . . ." (R. 489).[1]

Further indication that the District Court treated the question as one only of law appears in the Memorandum Decision (Appendix B of Petition for Certiorari, A-3). There the District Court states:

> ". . . However, since counsel for Swift had stipulated that Mr. Eades was killed when he was crushed between a boxcar and the plant building (which the proof in fact showed without dispute), the Court ruled as a *matter of law* that the proximity of the building to the track 'caused or contributed' to the death within the meaning of the indemnity provision and, therefore, did not submit the issue . . ."

II. Petitioner's Criticism of the Opinion of the Court of Appeals

Since the petition seeks review by this Court on the ground that the Court of Appeals has rendered a decision in conflict with a decision in another circuit, it is important to note and discuss petitioner's statement that the "Court below did not discuss the proper scope of review, did not consider whether the District Court's findings or conclusions were clearly erroneous and did not hold the District Court misapprehended the applicable rule of state law".

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1. Italics or other emphasis in this Response shall be supplied unless otherwise indicated.

In considering this criticism of the Opinion of the Court of Appeals, it should be noted that petitioner made no claim that the decision of the District Court should be affirmed under Rule 52a until after the Court of Appeals' decision had been reached.

In support of our position, we respectfully refer this Court to petitioner's printed briefs filed in the Court of Appeals The first of these briefs, styled "Brief", contains fifty-two printed pages and no reference is made to Rule 52a. The second is styled "Reply Brief" and contains twenty printed pages. Again, petitioner made no mention of Rule 52a.

Our position that the applicability of Rule 52a to this case was raised in the Court of Appeals for the first time on the petition for rehearing can reasonably be inferred from the next to last paragraph of the Statement of the Case appearing in the Petition for Certiorari. There petitioner states that its petition to rehear urged the "clearly erroneous" rule and, as the printed briefs demonstrate, this was the first time that such a contention had been made.

The Court of Appeals did not write an opinion denying Union's petition for rehearing but there can be little question that full consideration was given to petitioner's position with respect to Rule 52a since the Court of Appeals exercised its prerogative under Rule 40 of the Federal Rules of Appellate Procedure and required Respondent to file a response to the petition. We know of no rule requiring the Court of Appeals to prepare a written opinion acting on a petition for rehearing which disposes of a belated and overlooked issue which one of the parties may raise after briefing, argument and after the publication of the original Opinion of the Court of Appeals.

Accordingly, it was not the fault of the Court of Appeals that its decision ". . . did not discuss the proper scope of review, did not consider whether the District Court's findings and conclusions were clearly erroneous and did not hold the District Court misapprehended the applicable rule of law." Fault for the omission of a discussion of these issues in the Court of Appeals' Opinion, if any there be, rests solely with petitioner. Suffice it to say, the Court of Appeals gave full consideration to these issues when they were finally raised in the petition for rehearing.

ARGUMENT

This argument shall first discuss the general rules which this Court has established to guide its determination as to whether the writ will be granted. Thereafter we shall respond in order to the points raised in that section of the petition styled "Reasons for Granting the Writ".

I. This Court Reviews Only Real and Embarrassing Conflicts Between the Circuits

This Court has taken the opportunity on several occasions to discuss the rules and the reason for the rules which it has established for determining whether it will take jurisdiction of a case when the claim or contention is made, as is here done, that there is a conflict between the Circuits. These cases hold that it is not sufficient that there is simply a conflict between decisions of the Courts of Appeals. This Court holds that the conflict must be "real and embarrassing" or "special and important"; that there must be something more than that the Courts of Appeals have reached diverse conclusions on the same question.

The thought we attempt to express is better stated by Chief Justice Taft in *Layne & Bowler* v. *Western Mill*

Works, Inc., 261 U. S. 387, 67 L. Ed. 712, 43 S. Ct. 422. There this Court had granted the petition for certiorari on the same ground as here claimed, a conflict between decisions of the Courts of Appeals. We quote from the Opinion dismissing the writ of certiorari as being improvidently granted:

> "It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th, and 20th claims, that they were really in harmony, and not in conflict, and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that *it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.* The present case certainly comes under neither head."
>
> (261 U. S. 387, 392-93).

In *Rice* v. *Sioux City Cemetery*, (1955) 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897, this Court had granted certiorari in an important case involving a restrictive covenant. Subsequently the case was argued and decided by the Court on the merits. A petition for rehearing was filed and the petition placed special emphasis on a state statute, enacted after the cause of action arose, that would prevent a recurrence of the discrimination which originally prompted the Court's consideration of the case. The Court granted the petition for rehearing, vacated its prior order and dismissed the writ of certiorari. In taking this unusual action, this Court stated:

"In our consideration of this petition our attention has now been focused upon an Iowa statute enacted since the commencement of this litigation. Though it was in existence at the time the case first came here, it was then not seen in proper focus because blanketed by the issues of 'state action' and constitutional power for which our interest was enlisted. This Iowa statute bars the ultimate question presented in this case from again arising in that State. In light of this fact and the standards governing the exercise of our discretionary power of review upon writ of certiorari, we have considered anew whether this case is one in which 'there are special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19.

This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases.

* * *

A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (*Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 67 L. Ed. 922, 924, 43 S. Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S. Ct. v. vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) '*Special and im-*

> *portant reasons' imply a reach to a problem beyond the academic or the episodic.* This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."
>
> (79 L. Ed. at p. 900).

Of no less importance than these decisions in furnishing a guide for the Court in determining whether certiorari should be granted is Rule 19. That Rule prescribes the test to be applied in this language:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only *where there are special and important reasons therefor.* The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . ."

The significance of these restrictions upon the grant of the writ was well stated in *Magnum Import Co.* v. *De-Spoturno Coty*, 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. When, therefore, after the issue is filed and before its submission, an application is made for a suspension of

the judgment or decree of the circuit court of appeals, a heavy burden rests on the applicant."

(262 U. S., at p. 163).

II. The Claimed Conflict with the Decision of Another Circuit

In the foregoing discussion we have attempted to demonstrate to the Court that even if there be a sharp and basic conflict between *United States* v. *Spicer*, 332 F. 2d 750 (10th Cir., 1964), on the one hand, and the ultimate result reached by the Court of Appeals in the instant case, such conflict must create that "embarrassment" or present to the Court "special and important" reasons which would lead to the exercise of the Court's discretion to grant the writ. In this section of the response, we shall attempt to show the Court that there is in fact no conflict between this decision and *Spicer*.

A. Spicer Does Not Conflict

U. S. v. *Spicer, supra,* involved the construction of a joint and contractual will of a husband and wife and the estate tax implications of that will. The Tenth Circuit first reviewed the decision below and then held:

". . . We think the trial court, regardless of whatever reliance it may have placed upon the decree of the Kansas Probate Court, *properly construed the provisions of the Will.*"

332 F. 2d at 754.

After agreeing with the conclusions of the District Court, the Court of Appeals held further and as dictum unrelated to the final decision:

". . . While it is doubtful that the decision on the question of whether the will severed the joint tenancy would affect the estate tax due, we are of the opinion

that the court's finding that the parties by the will did not intend to sever the joint tenancies is not clearly erroneous."

332 F. 2d at 754.

Since the *Spicer* opinion fully agreed with the District Court's findings and conclusions there was no necessity for the Court to become involved in a discussion of the "clearly erroneous doctrine". It is only in those instances where the Court of Appeals does not agree with the District Court's decision that Rule 52a becomes involved and when that disagreement arises, the District Court's findings, as opposed to its conclusions of law, must be shown to be clearly erroneous before the Court of Appeals is at liberty to reverse.

There can hardly be conflict between these two decisions if our analysis of *Spicer* is correct. That is to say, if the Court of Appeals in *Spicer* agreed with and approved both the findings of fact and the conclusions of law reached by the District Court, then the clearly erroneous rule would play no part in the *Spicer* decision. In the case at bar the Court of Appeals wholly disagreed with the conclusions of law reached by the District Court.

Now let us assume that *Spicer* did involve the clearly erroneous rule and that the Court of Appeals in that case held that the Court will accord the clearly erroneous rule to the District Court's conclusions as to the appropriate state law. Even on this assumption there is still no conflict between *Spicer* and this case. The opinions in each of the cases may be laid side by side and, as we will shortly note, one must read into the instant opinion the most tortuous assumptions in order to create conflict between the decisions. The most that can be said in the unlikely

event that a legal scholar might at some time in the future compare the decisions is this:

First, *Spicer* holds that in applying the law of Kansas, a joint mutual and contractual will may sever a joint tenancy if it clearly appears that the parties so intend and a District Court finding that such intention did not clearly appear shall be tested by the clearly erroneous rule.

Second, this legal scholar would read the instant decision and wonder whether or not the clearly erroneous rule would apply to the District Court's construction under Tennessee law of a contract attempting to indemnify one from his own negligence. Whether the Court of Appeals for the Sixth Circuit did test the District Court's decision by the clearly erroneous rule could not be determined from the opinion. The opinion is silent on this question for the simple reason that the question was not timely raised by the parties.

But this Court is not concerned with scholarly or episodic questions. It is concerned rather with patent conflicts between the circuits on special and important questions. The question presented by the petition for certiorari here filed presents neither a special and important reason nor a conflict between the circuits.

B. Conflict Must Rest Only on an Assumption

It is, perhaps, regrettable that petitioner in its original briefing and presentation of this case to the Court of Appeals did not urge upon the Court the application of Rule 52a. There is no question but that petitioner's counsel were thoroughly familiar with that well known rule of the Federal Rules of Civil Procedure. (See, for example, *Anderson* v. *St. Louis Terminal Warehouse*, 173 F. 2d 436 (6th Circuit), Canada, Russell & Turner for Appellee.)

It is clear, however, that the Court of Appeals gave every consideration to petitioner's claim with respect to Rule 52a when the issue was finally raised in the petition for rehearing. The Court deemed the issue of such importance in fact that it directed respondent to file a reply to the petition. This is but consistent generally with the Court of Appeals' recognition of the very salutary provisions of Rule 52a and the Court's determination to give full effect to that rule.[2]

Since the published opinion of the Court of Appeals was silent with respect to Rule 52a, it necessarily follows that there is no patent or obvious conflict between the two decisions and, absent such patent conflict, it can hardly be said that there exists the "embarrassing" conflict which would merit this Court's intervention. Let us now consider how petitioner has generated the conflict which it relies upon to sustain its contention. Conflict between those decisions can only be claimed if one assumes that, in acting on this question in the petition for rehearing, the Court of Appeals decided that determination of the applicable state law was not to be tested by the clearly erroneous rule and, secondly, assume that the District Court's determination of the applicable state law was simply erroneous as opposed to being clearly erroneous. If one makes these two assumptions with respect to the decision below, then there may be conflict between the decision and the dicta in *Spicer*.

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2. See, for example, the following decisions of the 6th Circuit: *Boyd* v. *Gray*, 261 F. 2d 914, 915; *In re Glassman*, 262 F. 2d 857, 859; *Burpo* v. *Chesapeake and Ohio Railway Company*, 266 F. 2d 512, 514; *Rudd-Melikian, Inc.*, v. *Merritt*, 282 F. 2d 924, 929; *Elyria-Lorain Broadcasting Company* v. *Lorain Journal Co.*, 298 F. 2d 356, 357; *Strickler* v. *Pfister Associated Grocers*, 319 F 2d 788, 790; *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753, 765, *cert. den.* 382 U. S. 820, 86 S. Ct. 47, 15 L. Ed. 2d 66; *In re D.I.A. Sales Corp.*, 339 F. 2d 175, 178; and *Reed* v. *Robilio*, 400 F. 2d 730.

There is, however, an alternative assumption which is equally valid. The Court of Appeals could have agreed fully with petitioner's contention made both here and in the petition for rehearing. That is to say, the Court of Appeals could have accepted petitioner's argument that the trial court's determination of state law should be tested by the "clearly erroneous" doctrine, but then decided that such determination was "clearly erroneous".

That the latter assumption, which in fact accords with petitioner's position here, was the course taken by the Court of Appeals would seem to follow from the Sixth Circuit's treatment of the District Court's determination of state law in diversity cases. In *Rudd-Melikian, Inc.*, v. *Merritt*, 282 F. 2d 924, the Court held:

> "It may be that, notwithstanding the rule in The White Company v. W. P. Farley & Co., supra, the Kentucky law is uncertain on the question of whether the contract in question can properly be construed as granting an exclusive franchise. But the rule appears well settled that in diversity cases, where the local law is uncertain under the state court rulings, if a federal district judge has reached a permissible conclusion upon a question of local law, the Court of Appeals should not reverse, even though it may think the law should be otherwise. As said in a number of the cases, the Court of Appeals should accept the considered view of the District Judge. National Bellas Hess, Inc. v. Kalis, 8 Cir., 191 F. 2d 739, 741; John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Munn, 8 Cir., 188 F. 2d 1, 4; Elizabeth Hospital, Inc. v. Richardson, 8 Cir., 269 F. 2d 618, 619; Hamblin v. Mountain States Tel. & Tel. Co., 10 Cir., 271 F. 2d 562, note 1, page 564. See: Federal Digest, Courts, Sec. 406.2. See also: MacGregor v. State Mutual Life Assur. Co., 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846; Helvering v. Stuart, 317 U. S. 154, 163, 63 S. Ct. 140, 87 L. Ed. 154.

> We recognized the rule in the following two cases. In re Glassman, 6 Cir., 262 F. 2d 857, 859; Boyd v. Gray, 6 Cir., 261 F. 2d 914, 915."
>
> 282 F. 2d at 929.

To the same effect is *In re Glassman*, 262 F. 2d 857, where the rule is stated:

> "We recognize that this court is required to follow the law of Michigan in matters involving state law. We are cited to no decision of the Supreme Court of Michigan construing the Michigan Bulk Chattel Mortgage Act. However, it is the general rule that when the state courts have not adjudicated a question of local statutory law, the appellate court shall give considerable weight to the considered views of a district judge as to the laws of his state upon doubtful questions of local law. Mutual Benefit Health & Accident Association v. Cohen, 8 Cir., 194 F. 2d 232, 241, certiorari denied 343 U. S. 965, 72 S. Ct. 1059, 96 L. Ed. 1362. The Supreme Court of the United States applies this principle in cases where the state courts have not decided the state question presented. MacGregor, Executor, v. State Mutual Life Assurance Co., 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846. Cf. Helvering v. Stuart, 317 U. S. 154, 163, 63 S. Ct. 140, 87 L. Ed. 154; Estate of Spiegel v. Commissioner of Internal Revenue, 335 U. S. 701, 707-708, 69 S. Ct. 301, 93 L. Ed. 330."
>
> 262 F. 2d 859.

We can see no reason for the Sixth Circuit to deviate from the rule stated in *Rudd-Melikian* and *In re Glassman*. Thus, it would appear that the more likely assumption to make would be that now claimed by petitioner. That is to say, that the Court of Appeals considered the trial court's decision and found it clearly erroneous. If this assumption be correct, then review by this Court would not be based upon an embarrassing conflict but rather petitioner's success in prevailing upon this Court to become a Supreme

Court of Appeals simply to review Courts of Appeals decisions, a function which the Court has stated it will not perform. (See, for example, *Magnum Import Co.* v. *Coty, supra,* 262 U. S. at page 63.)

While speaking of conflicting and inconsistent decisions it would be important to note the anomaly that would have occurred if the Court of Appeals had affirmed the District Court in the instant case. This affirmance would have resulted in completely conflicting decisions by the Sixth Circuit in cases involving construction under Tennessee law of railroad indemnity agreements even though, as the Court of Appeals notes, there was "no significant distinction" between the provisions of such agreements. (Appendix A-13) While this Court seeks to resolve conflict between the circuits, it is no less the objective of the Court of Appeals to avoid conflicts in its own decisions. Given essentially identical facts and essentially identical documents, it would have been anomalous, therefore, to have the Court of Appeals for the Sixth Circuit announce its decisions in *Brogdon* v. *Southern Railway Company,* 384 F. 2d 220, and *Southern Railway Company* v. *Foote Mineral and Chemical Company,* 384 F. 2d 224, on September 8, 1967, and thereafter on April 12, 1968, announce the decision in this case reaching opposite results in these decisions even though only Tennessee law was involved in the construction of these essentially identical agreements providing for indemnity from one's own negligence.

III. The Decision of the Court of Appeals Was Correct

While this Court is very directly concerned with the issue as to whether or not this case presents the requisite "embarrassing conflict" between the circuits, it is also interested in whether the Court of Appeals' decision was correct. The correctness of the decision is relevant both to

ascertaining whether there are special and important reasons for granting the writ and in response to petitioner's contention that the Court of Appeals has decided important questions of Tennessee law in a way which conflicts with applicable Tennessee decisions. It shall now be our objective to show that the decision below was correct.

Our basic argument to support this decision is as follows:

1. The District Court's decision was clearly erroneous.

2. In Tennessee, construction of a written contract, and particularly a contract which attempts to indemnify for one's own negligence, such as here involved, is a question of law and not a question of fact. Thus, the District Court's decision was solely a conclusion of law and the "clearly erroneous" doctrine does not apply to such conclusions but only to findings of fact.

A. The District Court's Decision Was Clearly Erroneous

The trial court concluded that petitioner was entitled to full indemnity under the agreement here involved even though the accident which caused the damage was the result of petitioner's "sole negligence" (Appendix A-13). This conclusion was based in large part on an early decision of the Sixth Circuit, *Buckeye Cotton Oil Co.* v. *L. & N. R. R. Co.*, (1928) 24 F. 2d 347, though there were two more recent decisions arising in Tennessee in which full indemnity had been denied as a matter of law under somewhat similar indemnity agreements.

One of the two cases to which we refer is *Kroger Company* v. *Giem*, 215 Tenn. 459, 387 S. W. 2d 620 (1964). In that case the court considered an action by a warehouse owner against a subcontractor and general contractor for damages occasioned by fire when certain of the subcon-

tractor's employees allowed sparks to fall upon flammable material. The court held on the facts there was concurring negligence on the part of both parties. The contractor and owner had entered into a contract which provided in part as follows:

> "The contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury arising in connection with this contract. He shall make good and hold the owner harmless from any such damage or injury."

The Supreme Court denied indemnity under this simple and direct provision for the reason that this clause did not contain "clear and unequivocal terms" indemnifying plaintiff for its own negligence. Specifically the Court held:

> "The Court of Appeals said, and we agree to its correctness, that it is nearly a universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by 'clear and unequivocal terms;' and general words will not be read as expressing such an intent. 42 C.J.S., Indemnity, Sec. 12, pp. 580-581; 27 Am. Jur., Indemnity, Sec. 15, pp. 464-465; 175 A.L.R., Sec. 19, pp. 34-37. The only case from this State which discusses this rule, which has been cited or which we have been able to find, is *Buckeye Cotton Oil Co.* v. *Louisville & Nashville R. Co.*, 24 F. 2d 347, 348 (6th Cir.). In that case it is said:
>
> > 'There was no rule of public policy which forbade the railroad company from contracting with the oil company for indemnity against any damages which the railroad might be required to pay as the result of the ordinary negligence of its employees in operating engines and cars on these tracks . . . It is said, however, and rightly so, that a contract will not be

> so construed, unless it was clearly intended to have that effect. This, of course, does not mean that the intention must be expressed in terms, but that, if not so expressed, it must otherwise clearly appear in the language used.
>
> "When this rule is applied to Article 30 we cannot see any intent, express or implied, to indemnify against indemnitee Kroger's proximate contributory negligence."

The key phrase in the opinion is ". . . by 'clear and unequivocal terms;' and general words will not be read as expressing such an intent. . . ." Tennessee thus follows the view expressed by the courts in the numerous cases cited in support of the following statement appearing in 175 A.L.R., at pages 29-32:

> "The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types of contracts, namely, the ascertainment of the intention of the parties. To do this, the courts hold it to be important for them to consider not only the language employed in the contract, but the circumstances surrounding the parties and the object in view which induced the making of it. *In the overwhelming majority of the cases the result reached by their interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts.* While this rule of construction is expressed by the courts in various forms, all of them in effect say: 'A contract of indemnity will not be construed to indemnify a person against his own negligence where such intention is not expressed in "clear and unequivocal terms".' In support of this rule it has been stated that general words alone do not necessarily import an intent to hold an indemnitor liable for damages resulting from the negligence of the indemnitee and that no inference therefrom can establish such intent. The words of the contract will

> be scrutinized closely to discover whether such an intent is actually revealed in them and every presumption is against such intention. In the absence of explicit language to the contrary, courts will not interpret an indemnity agreement as a promise by the indemnitor to save the indemnitee harmless on account of the latter's own negligence."

The annotator's footnote to the foregoing quotation states as follows:

> "There are literally hundreds of cases supporting this proposition. The following list of cases illustrates its universal application: . . ."
>
> 175 A.L.R. at p. 30.

The second of these two more recent decisions is *Brogdon* v. *Southern Railway Company*, 253 F. Supp. 676 (E.D. Tenn., 1966), affirmed, 384 F. 2d 220. There, as in *Giem, supra*, the court found that the damages for which indemnity was sought resulted from the joint negligence of both indemnitor and indemnitee. Both the trial court and the Court of Appeals denied full indemnity to the railroad company even though the indemnity agreement contained essentially the same provisions as that here involved.

There is also a third decision arising under Tennessee law which merits comment. We refer to *Viking Freight Co.* v. *Associated Transports, Inc.*, Civil No. 3434 (M. D., Tenn., Dec. 6, 1966).[3] In *Viking* indemnity was sought even though, just as in the case at bar, the accident resulted from the sole negligence of the indemnitee. The Court discussed the several pertinent decisions on this question and the following language is significant with respect to the law in Tennessee:

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3. The full text of Judge Gray's memorandum decision in *Viking Freight Co.* v. *Associated Transports, Inc.*, appears in Appendix pages 1a s-11a s to Swift & Company's reply brief in the Court of Appeals.

"Although *Buckeye* was decided prior to *Erie*, its holding that although there is no rule of public policy prohibiting a party from contracting for indemnity against damages it might be required to pay as a result of its negligence, such a contract will not be so construed unless it was clearly intended to have that effect and was approved in both *Kroger* and *Brogdon*.

In *Kroger*, the Tennessee Supreme Court added 'that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by "clear and unequivocal terms"; and general words will not be read as expressing such an intent.' 387 S. W. 2d at p. 626. This language is quoted approvingly in *Brogdon* (253 F. Supp. at p. 680).

* * *

"It will be noted that, in each of these three cases, the courts found both indemnitor and indemnitee guilty of negligence. *In that respect they differ factually from the case before the court where there is no showing that the defendant was guilty of any negligence, either active or passive, which contributed, directly or indirectly, to the injuries suffered by the successful plaintiff in the tort action.* This factual difference, however, would not preclude plaintiff's recovery if the indemnity provisions relied on clearly and unequivocally show that it was the intent of the parties to provide for indemnity to the tortfeasor under the particular circumstances here.

"Broad as the provisions of the contract herein involved are, they are expressed in general terms. Applying the Tennessee rule of clear and unequivocal expression, the court is of the opinion that the contract shows no intent to provide indemnity for losses sustained as a consequence of plaintiff's negligent acts committed before the contract was entered into and hidden from defendant behind the sealed doors of the trailer."

Based upon the foregoing authorities, respondent respectfully suggests the District Court's decision was "clearly erroneous" and the Court of Appeals' reversal of that decision was correct.

B. Erroneous Conclusions of Law Are Not Binding on the Court of Appeals

We shall now carry this case another step and make the assumption that the Court of Appeals in its consideration of the belatedly raised issue of Rule 52a determined that the District Court's decision was based upon an erroneous conclusion of law and that, therefore, the clearly erroneous doctrine was not applicable.

1. Conclusions of Law Distinguished from Findings of Fact

As a preface to a discussion of this question, we wish to point out that the "clearly erroneous doctrine" does not apply to legal conclusions but only to factual determinations. This would seem to be the universal application of Rule 52a, as appears from the following statement in 5 *Moore's Federal Practice, 2d Edition*, Sec. 52.03(2):

> "Conclusions of Law Are Not Binding. The 'unless clearly erroneous' doctrine, discussed above, applies only to appellate review of findings of fact. It does not apply to the district court's conclusions of law. This is clear both from the context of the Rule and from long established principles both at law and in equity that the appellate court is, of course, not concluded by the trial court's view of the law. The requirement in Rule 52(a) that, in addition to finding the facts, the district court shall 'state separately its conclusions of law thereon' is to furnish the causal link between the facts and the judgment rendered. But in reviewing the judgment, so far as questions or conclusions of law are concerned, the appellate court is not concluded in any degree by the trial court's view of the law.

> "Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, when there is error as to the law."

This statement seems well founded and finds its basis in *United States* v. *U. S. Gypsum Co.*, (1948) 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746. There this Court stated:

> "In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the General Electric rule justified the arrangements or because of a misapplication of Masonite or Interstate Circuit, *errors of law occurred. These we can, of course, correct.*"
>
> 333 U. S. at p. 394.
>
> See also *Sheldon & Co.* v. *Commissioner*, (6th Cir.) 214 F. 2d 655.

And the *U. S. Gypsum* case also held that the clearly erroneous rule did not apply to mixed questions of law and fact:

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."
>
> 333 U. S. at p. 396.

2. Construction of Indemnity Contract—Solely a Question of Law

The almost universal rule is that the meaning and construction of an unambiguous written contract is a matter of law for the Court and not a question of fact to be determined either by the jury or the Court sitting without

a jury. Perhaps the leading case on this question in Tennessee is *Toomey* v. *Atyoe,* 95 Tenn. 373, 32 S. W. 254, where the Court held:

> "What the written contract of the parties means upon its face, what the extent of the obligation assumed and imposed thereby, are questions of law to be decided by the Court as contra distinguished from a jury, and for ultimate decision of this Court."

We say that *Toomey* is perhaps the leading case in Tennessee for the reason that it has been cited as authority for the above quotation in the following Tennessee cases:

Quigley & Co. v. *Shedd,* 104 Tenn. 560, 58 S. W. 266.

Publishing Co. v. *Gamble,* 115 Tenn. 663, 684.

Pile v. *Carpenter,* 118 Tenn. 288, 296.

Godson v. *McFadden,* 162 Tenn. 531, 39 S. W. 2d 287.

McQuiddy Printing Co. v. *Hirsig,* 23 Tenn. App. 434, 445, 134 S. W. 2d 197.

Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. *Holt,* 32 Tenn. App. 559, 566, 223 S. W. 2d 203.

Most recently with respect to the construction of written contracts being exclusively a question of law, the Supreme Court of Tennessee has held in *Petty* v. *Sloan,* 197 Tenn. 630, 277 S. W. 2d 355:

> "(14-16) Of course it is a well settled, and practically universally recognized principle, that the cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention as best can be done consistent with legal principles. *Thompson* v. *Exchange Bldg. Co.,* 157 Tenn. 275, 8 S. W. 2d 489, 60 A. L. R. 693; *Laue* v. *Grand Fraternity,* 132 Tenn. 235, 177 S. W. 941, L. R.

A. 1915F, 1056, annotated cases 1917A, 376 and others. In getting at this intention we of course do not determine what the state of the mind was of the parties at the time the contract was executed but rather what their intention was as actually embodied and expressed in the instrument as written. *Of course it is a well recognized principle that the ascertainment of such intention is a question of law or a judicial function for us to perform when the language is plain, simple and unambiguous.*"

197 Tenn., at p. 642.

a. THE PAROL EVIDENCE RULE

In considering the relationship of the parol evidence rule to agreements which are claimed to indemnify a party from his own negligence, the type of agreement here involved, it is important to note the requirements which the Tennessee Supreme Court has imposed upon such agreements. As we will state in more detail subsequently in this brief, indemnity from one's own negligence must appear by "clear and unequivocal terms" (Court's emphasis), and such indemnity must appear in the "language used" in the contract rather than from extrinsic facts that would create an issue of fact under Rule 52a.

It is, however, the almost universal rule that parol evidence which would, of course, lead to an issue of fact, is not admissible to modify, explain, or enlarge the terms of a written contract unless the contract is ambiguous or equivocal or unclear. Ambiguity, equivocation, or lack of clarity is the very antithesis of the requirements of an indemnity agreement.

The parol evidence rule is especially followed in Tennessee, as is shown in *Bryan* v. *Hunt,* 36 Tenn. 543:

"It is well-settled rule of the common law, independently of the statute of frauds, that where a contract has been reduced to writing, and is complete in its terms and free from ambiguity, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract. The written instrument must be considered as containing the true agreement between the parties, and as furnishing the best evidence of their final intentions and acts. And this rule, excluding prior or contemporaneous stipulations or conversations, applies with no less force to simple contracts than to contracts by specialty. 4 Ph. on Ev., ed. of 1849, note 295."

36 Tenn. 544.

And in *Sanford* v. *Keef*, 140 Tenn. 368, 204 S. W. 1154, the Court stated:

". . . its language, not being ambiguous or equivocal, the construction and legal effect thereof upon the rights and duties of the contracting parties were and are matters of law for the court."

See also: *Ellis* v. *Hamilton*, 36 Tenn. 511, 514.

Kearly v. *Duncan*, 38 Tenn. 397, 399, et seq.

Godson v. *McFadden*, 162 Tenn. 528, 39 S. W. 2d 287.

Petty v. *Sloan*, 197 Tenn. 630, 277 S. W. 2d 355.

Oman Construction Co. v. *Tennessee Central Ry. Co.*, 212 Tenn. 556, 370 S. W. 2d 563.

McQuiddy Printing Co. v. *Hirsig*, 23 Tenn. App. 434, 134 S. W. 2d 197.

The rule is not merely one of evidence but in Tennessee the parol evidence rule has become a "rule of substantive law".

U. S., ex rel. T.V.A. v. *Washington County,* 271 F. Supp. 55.

Wilson v. *Wilson,* 23 Tenn. App. 244, 250, 130 S. W. 2d 140.

It is respectfully suggested that under *Erie Railroad* v. *Tompkins,* 304 U. S. 64, the Federal Courts are obligated to follow the Tennessee law with respect to the parol evidence rule, particularly when the state court has described this rule as a "rule of substantive law", and the District Court's erroneous construction of this indemnity agreement was solely an error of law, reviewable by the Court of Appeals without the restriction of Rule 52a.

b. THE PAROL EVIDENCE RULE APPLIES ESPECIALLY TO INDEMNITY AGREEMENTS

A discussion of this point involves again the latest decision of the Tennessee court on indemnity agreements. We refer to *Kroger Co.* v. *Giem, supra,* the decision which furnished the basic authority for the Court of Appeals' decision.

As we have noted, *Giem* involved a building construction contract which obligated the contractor to indemnify the owner if damage or injury resulted during construction. A fire occurred on the premises and the owner sued to recover its damages under the indemnity agreement. The building contractor contended that the fire was the result of the joint and concurring negligence of the parties and that the agreement would not indemnify the owner from its own negligence. These facts should be compared to the case at bar where the party seeking indemnity was solely negligent.

In denying indemnity, the Tennessee Supreme Court held:

> "The Court of Appeals said, and we agree to its correctness, that it is nearly a universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by 'clear and unequivocal terms,' and general words will not be read as expressing such an intent. . . ."

And, again, it said:

> ". . . It is said, however, and rightly so, that a contract will not be so construed, unless it was clearly intended to have that effect. This, of course, does not mean that the intention must be expressed in terms, but that, if not so expressed, *it must otherwise clearly appear in the language used.*"

It will be observed from the first quotation that indemnity for another's negligence will not be found unless the contract provides for indemnification in such case by "clear and unequivocal terms" and "general words will not be read as expressing such intent". There is no reference to bringing in extraneous facts to show the intent to indemnify for negligence. Such an intent must be supported solely by the indemnity contract.

The second quotation carries this rule further and the Court holds that the intent to indemnify negligence ". . . must otherwise clearly appear in the language used". In other words, if indemnity for one's own negligence is intended, then such intention must be found, as a matter of law by the Court, in the context or language of the Agreement itself, and not as a matter of factual determination by the Court or jury, from extrinsic facts existing outside of the Agreement.

3. Petitioner's Contention with Respect to Rule 52a Concedes That This Contract Is Ambiguous and Unclear

While we have stated the Parol Evidence Rule, we should also note that it is an equally well settled rule of law that if a contract is unclear, ambiguous or equivocal, then parol evidence may be admitted to explain the terms of that contract, thus creating an issue of fact.

In *Faulkner* v. *Ramsey,* 178 Tenn. 372, 158 S. W. 2d 710, the Court stated the rule thusly:

> "In *Jones on Evidence,* vol. 2, sec. 453, it is said: 'If the language of the written memorial of a contract is ambiguous or obscure as to its meaning, it is permissible, in order that the instrument may be properly interpreted, to introduce in evidence proof of the subject matter of the contract, the relations existing between the parties, the facts surrounding them at the time when they entered into the agreement, and also their acts subsequent thereto. Likewise, the conversation and statements of the parties coincident with or just prior to the execution of the contract may be admitted to aid in the construction of the writing."
>
> 178 Tenn. at p. 374.

And in *McKee* v. *Potomac Insurance Co.,* 208 Tenn. 152, 344 S. W. 2d 366, the Court held:

> ". . . Of course, if there is any *ambiguity* about the description or what is meant, extrinsic evidence is admissible to clarify the situation and show what was the intent of the parties."
>
> 208 Tenn., at p. 155.

This rule has been recognized by the Sixth Circuit. In *Beaty* v. *Brock & Blevins Company, Inc.,* 319 F. 2d 43, the Court stated:

> "If the language of the contract be *clear and unambiguous, the ascertainment of the intention of the parties is a question for the court. Petty* v. *Sloan, supra.* If the language of the contract is not free of ambiguity, extrinsic evidence, such as evidence of the interpretation the parties themselves have given the contract, may be received to determine the intention of the parties. *Fidelity-Phenix Fire Ins. Co. of New York* v. *Jackson,* 181 Tenn. 453, 181 S. W. 2d 625, 1944. Upon the court's findings of fact from such evidence, its interpretation of the contract is largely based. *J. W. Bateson Company, Inc.* v. *Romano,* 266 Fed. 2d 360 (C.A. 6) 1959."

The statement of the case in the Petition for Certiorari refers to the findings of the District Court, as opposed to conclusions of law, thus attempting to cloak that decision with the clearly erroneous rule which is applied to findings of fact by the trial court. This same contention was argued at length in the Petition for Rehearing filed in the Court of Appeals. Petitioner's contention in this respect necessarily concedes that the contract must be explained by extrinsic evidence and as shown above the only way such extrinsic evidence is admissible is to explain equivocation and ambiguity in the contract.

The contention which petitioner now makes is the very reason that the Court of Appeals' decision in this case was correct. To gain indemnity from its own negligence, Union says that extrinsic evidence must be considered. The law in Tennessee, as stated in *Giem,* is to the contrary. *Giem* says that indemnification must appear by "clear and unequivocal terms" or indemnification ". . . must otherwise clearly appear in the *language used*".

CONCLUSION

Respondent respectfully suggests that the Court of Appeals' decision precisely followed the applicable Tennessee law with respect to the construction of this indemnity agreement and that such decision was correct and just. Further the decision in no way conflicts with a decision of another circuit. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK PETREE
EVANS, PETREE, COBB & EDWARDS
900 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Respondent